

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TODD EDMUND GRAY,

Defendant-Appellant.

UNPUBLISHED

July 21, 2000

No. 220409

Ottawa Circuit Court

LC No. 98-022191-FH

Before: Smolenski, P.J., and Zahra and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The trial court sentenced defendant to a prison term of 24 to 180 months. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred by denying his motion for a mistrial based on prosecutorial misconduct. We disagree. The trial court's grant or denial of a mistrial will not be reversed on appeal absent an abuse of discretion. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996).

Defendant contends that he was entitled to a mistrial because the prosecutor impermissibly commented on defendant's failure to testify. During his rebuttal closing argument, the prosecutor made the following statement:

[Defendant's attorney] and his client-defendant cannot afford to believe that the [victim] was telling the truth. Certainly, that would have severe repercussions that resulted in a guilty verdict of his defendant. That's why he has to stand here in front of you and say that [the victim] is not telling the truth. Isn't there more corroborating evidence, he argues. Well, as you can about imagine, unfortunately, in these type of cases, it come [sic] down to the two people, the two parties involved in the incident. *Here you heard from one of the two parties. [The victim] told you it did happen. That's why you can come back with a guilty verdict.* [Emphasis added.]

We do not believe that the prosecutor's statement was a comment on defendant's failure to testify. Instead, the comment was clearly a reference to MCL 750.520h; MSA 28.788(8), which provides that "[t]he testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g." In his own closing statement, defense counsel vigorously attacked the victim's credibility, arguing that there was "a total lack of corroboration" that the sexual assaults occurred. The prosecutor properly explained to the jury in rebuttal that the victim's testimony need not be corroborated for defendant to be found guilty of violating MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Because the prosecutor did not comment on defendant's failure to testify, we find that the trial court properly denied defendant's motion for a mistrial.

Defendant next argues that the trial court erred by denying his request that the "missing witness instruction," CJI2d 5.12, be read to the jury. We disagree. This Court reviews a trial court's denial of a request for a "missing witness" instruction for an abuse of discretion. *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000).

The prosecutor endorsed the following witnesses on the information: 1) the victim; 2) Tom Clement; 3) Trish Dodge; 4) Noreen Betteridge; 5) Christine Lindblom; 6) Gillian Gray;¹ 7) Lillian Gray, and 8) Dylan Lindblom. At trial, the prosecutor called only the victim, Tom Clement, Trish Dodge, and Lillian Gray as witnesses. Before the parties presented their closing arguments, defendant made the following request regarding jury instructions:

I don't have the exact instruction number. However, your Honor, it's the one about the failure of the prosecution to present a witness, that it's presumed the witness's testimony would have been favorable to the other side. . . . The prosecution is to produce the witnesses on the list of witnesses that he intends to call at trial. In this case, there was Noreen Betteridge, Christine Lindblom, Gillian Gray, who should be, really, Gabrielle Gray, and Dylan Lindblom. I never received any notice of their intent not to call them, and they weren't called, and no due diligence has been shown why they were not called.

Defendant was apparently referring to CJI2d 5.12, which provides:

[Witness's name] is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case.

The trial court denied defendant's request that the jury be instructed pursuant to CJI2d 5.12. We do not believe that the trial court abused its discretion by denying defendant's request.

Defendant appears to contend that the prosecutor must, in all cases, either produce all witnesses listed on the information or prove that due diligence was used to produce these witnesses. This

¹ Apparently, the name Gillian Gray was a typographical error, and referred to Gabrielle Gray.

argument is contrary to the plain language of MCL 767.40a; MSA 28.980(1), which provides in relevant part:

(1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.

* * *

(3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.

(4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.

Generally, if a prosecutor endorses a witness, he or she is obliged to exercise due diligence to produce that witness at trial regardless of whether the endorsement was required. *People v Wolford*, 189 Mich App 478, 483-484; 473 NW2d 767 (1991). However, pursuant to §767.40a(4), the trial court may grant a prosecutor leave to delete witnesses from his or her witness list. *People v Burwick*, 450 Mich 281, 288; 537 NW2d 813 (1995).

In the present case, the trial court conducted an in-chambers conference before trial. At that conference, the trial court accepted the prosecutor's final list of witnesses. Defendant was present at that conference, and did not object to the prosecutor's decision not to call several witnesses who had been listed on the information. The trial court's decision to allow the prosecutor to delete from the list of witnesses he intended to call at trial was proper under MCL 767.40a; MSA 28.980(1), and the prosecutor was not obliged to use due diligence to produce the deleted witnesses at trial. Therefore, we find that the circuit court did not err by denying defendant's request that the jury be instructed pursuant to CJI2d 5.12.

Affirmed.

/s/ Michael R. Smolenski
/s/ Brian K. Zahra